v. 2915

No. 14554

United States Court of Appeals

For the Ninth Circuit.

AERIAL LUMBER COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED
MAR 10 1955
PAUL P. O'BRIEN
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-18-55

No. 14554

United States Court of Appeals

For the Ninth Circuit.

AERIAL LUMBER COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-18-55

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 5

Certificate of Clerk to Record on Appeal 66

Certificate of Clerk to Supplemental Record on Appeal 68

Complaint 3

Cost Bond on Appeal by Cash Deposit 11

Exhibits, Plaintiff's:

No. 1—Contractual Documents Re Seattle Sale 22

2—Contractual Documents Re Everett Sale 36

4—Letter, Dated November 9, 1948 ... 55

5—Letter, Dated November 15, 1948 .. 57

6—Copy of Certificate of Settlement.. 60

Findings of Fact and Conclusions of Law 7

Judgment 10

Memorandum of Costs and Disbursements 13

Names and Addresses of Counsel 1

Notice of Appeal 10

INDEX PAGE

Statement of Points Upon Which Appellant Intends to Rely 70

Transcript of Proceedings 14

Witness:

Ross, Charles W.

—direct 43, 47

—voir dire 46

—cross 63

NAMES AND ADDRESSES OF COUNSEL

RAYMOND D. TORBENSON, and
RICHARD M. THATCHER,

Attorneys for Appellant,

755 Dexter Horton Bldg.,
Seattle 4, Washington.

CHARLES P. MORIARTY, and
F. N. CUSHMAN,

Attorneys for Appellee,

1012 U. S. Court House,
Seattle 4, Washington.

United States District Court, Western District of Washington, Northern Division

No. 3352

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AERIAL LUMBER COMPANY,

Defendant.

COMPLAINT

I.

In the above-entitled action the United States of America, seeks a money judgment only against the Aerial Lumber Company, formerly Oceanic Lumber & Wrecking Company, Inc., a corporation organized under the laws of the State of Washington and having its principal place of business in Seattle, in the Northern Division of the Western District of Washington.

Jurisdiction is based on Title 28, U.S.C., Section 1345.

II.

That on November 10, 1948, in response to an advertisement by the Housing and Home Finance Agency of the Public Housing Administration, the Oceanic Lumber and Wrecking Company, Inc., bid, and was granted a contract for the purchase of Item No. 5 contained in said bid for the sum of $1.500.00.

III.

That under the terms of said contract, said de-

fendant was to pay the Public Housing Administration the said sum of $1,500.00 and to remove the temporary houses located on Federal Public Housing Project No. 1 at Everett, Washington, within 90 days from the date of the acceptance of said bid. That a copy of said contract is hereto attached and made a part of this complaint.

IV.

That on November 5, 1948, the said defendant was awarded Building No. 10 for $1,200.00, Building No. 20 for $1,600.00 and Building No. 24 for $800.00 under the same terms and conditions and under the same form of contract as heretofore referred to relative to Item No. 5.

V.

That the defendant utterly failed to remove the buildings according to the terms of the contract, or to pay the amount of the bid and in accordance with the terms of the contract, the plaintiff called for rebids and declared the contract in default.

VI.

That thereafter the General Accounting Office made an investigation of the accounts between the Oceanic Lumber and Wrecking Company, Inc., and the United States of America and determined that the sum of $2,723.70 was due from the Oceanic Lumber and Wrecking Company, Inc., to the United States of America and issued its Certificate No. 50218 on April 3, 1950, a copy of said certificate being attached hereto and made a part of this complaint.

VII.

That on or about July 25, 1952, the Oceanic Lumber and Wrecking Company, Inc., filed an amended articles of incorporation changing its name to Aerial Lumber Company.

Wherefore, the United States of America prays for judgment in the sum of $2,723.70 and for interest at the rate of 6% per annum from April 3, 1950, and for its costs and disbursements herein.

/s/ J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed January 27, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now the Defendant above named and in answer to Plaintiff's Complaint, admits, alleges and denies as follows:

I.

With respect to Paragraph I thereof, admits all but the first line thereof.

II.

With respect to Paragraph II thereof, admits all but the words "and was granted a contract" which defendant denies.

III.

With respect to Paragraph III thereof, admits

the execution of documents appearing as pages 5 through 9 of the Exhibit to the Complaint, and denies every other allegation or inference therefrom in said paragraph contained.

IV.

With respect to Paragraph IV thereof, admits the execution of documents appearing as pages 1 through 4 of the Exhibit to the Complaint, and denies every other allegation or inference therefrom in said paragraph contained.

V.

With respect to Paragraph V thereof, admits that plaintiff called for rebids and denies every other allegation or inference therefrom in said paragraph contained.

VI.

With respect to Paragraph VI thereof, admits the issuance of the documents appearing as pages 10 and 11 of the Exhibit to the Complaint, and denies every other allegation or inference therefrom in said paragraph contained.

VII.

Admits Paragraph VII thereof.

And for Further Answer and Affirmative Defense Defendant Alleges:

I.

That prior to the expiration of sixty (60) days from mailing notices of acceptance as alleged in plaintiff's Complaint, Plaintiff, through its duly

authorized agents, for valuable consideration, waived any rights plaintiff might have claimed by virtue of the matters and things contained in plaintiff's Complaint in that plaintiff agreed to release defendant from them in consideration of defendant forfeiting its bid deposit of $280.00 and permitting plaintiff to offer the property for rebid. Plaintiff is estopped by said acts of its agents to maintain this action.

Wherefor defendant prays that plaintiff's complaint be dismissed and defendant recover such costs and disbursements as the law and rules of this Court may permit.

/s/ RAYMOND D. TORBENSON,
/s/ RICHARD M. THATCHER,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 5, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been fully heard by the above-entitled Court, sitting without a jury, the parties being represented by Counsel and the Court having rendered its oral decision, now, therefore, the Court makes and enters its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That on November 10, 1948, defendant corporation or its predecessor bid and was granted a contract by plaintiff for the purchase of housing unit No. 5 under Contract No. H.A. (Wash-45073).

II.

That on November 5, 1948, said defendant was granted a contract by plaintiff for the purchase of housing units Nos. 10, 20 and 24 under Contract No. H.A. (Wash-45245).

III.

That defendant failed to pay for or remove said buildings, thereby violating the terms of the contract.

IV.

That plaintiff's Exhibit No. 6, being certificate No. 50218 from the General Accounting Office, correctly states the damage to plaintiff in the total amount of $2,723.70, plus interest from the date of said certificate, April 3, 1950, to the date of entry of said judgment, at the rate of 6%. Defendant excepts to finding of fact IV above and his exception is allowed.

Done in Open Court this 16th day of August, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

CONCLUSIONS OF LAW

I.

That plaintiff has sustained its burden of proof and is entitled to recover of and from the defendant on account of said contract the sum of $2,723.70, together with interest from April 3, 1950, to date of judgment, being $710.86, and thereafter at the legal rate.

II.

That plaintiff is entitled to recover as a further item, the taxable costs and disbursements incurred herein.

III.

That defendant take nothing by its affirmative defense herein. Exceptions allowed defendant.

Done in Open Court this 16th day of August, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved:

/s/ F. N. CUSHMAN,
Asst. U. S. Attorney.

Approved:

.....,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 16, 1954.

United States District Court, Western District of Washington, Northern Division

No. 3352

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AERIAL LUMBER COMPANY,
Defendant.

JUDGMENT

This cause having been fully heard by the above-entitled Court, sitting without a jury, the parties being represented by counsel, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefore, it is

Ordered, Adjudged and Decreed That the plaintiff shall recover from and of the defendant the sum of $2,723.70, together with interest from April 3, 1950, in the sum of $710.86, and together also with its costs in the amount of $49.60. And that defendant take nothing by its affirmative defense herein.

Done in Open Court this 16th day of August, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved:

/s/ F. N. CUSHMAN,
Asst. U. S. Attorney.

Approved:

.....,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The United States of America, Plaintiff, and to Charles P. Moriarty, United States Attorney, Its Attorney:

You Are Hereby Notified that, pursuant to Rule 73, Federal Rules of Civil Procedure, the Defendant above named does hereby take an appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment, and each and every part thereof, made and entered by the Honorable John C. Bowen herein on the 16th day of August, 1954.

Dated this 14th day of September, 1954.

RAYMOND D. TORBENSON and
RICHARD M. THATCHER,
Attorneys for Aerial Lumber Company.

[Endorsed]: Filed September 14, 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL BY CASH DEPOSIT

The Defendant-Appellant, Aerial Lumber Company, hereby deposits with the Clerk of the above-entitled Court, the sum of Two Hundred Fifty ($250.00) Dollars for cost bond on appeal in conformity with Rule 73 (c) of the Federal Rules of

Civil Procedure and is held and firmly bound unto the Plaintiff above named in said penal sum of $250.00.

The condition of this obligation is such that if the above-named Aerial Lumber Company shall pay costs awarded the Plaintiff if the appeal herein is dismissed or such costs as the Court may award Plaintiff if the judgment herein is modified or affirmed, then this bond and obligation shall be void and of no effect; otherwise, it shall remain in full force and effect.

Sealed with my seal and dated this 16th day of September, 1954.

[Seal] AERIAL LUMBER COMPANY,

By /s/ .....,
Its President.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 22, 1954.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

Disbursements

	Amount Claimed
Clerk's Fees	$15.00
Marshal's Fees	5.70
Attorney's Fees	20.00
Witness Fees:	
Charles W. Ross, Poulsbo, Wash., 1 day, 70 miles	8.90
Total	$49.60

Taxed August, 1954.

.....,
Clerk.

Duly Verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 16, 1954.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3352

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AERIAL LUMBER COMPANY,
Defendant.

Before: The Honorable John C. Bowen, District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

August 4, 1954—10:00 A.M.

Appearances:

FRANCIS N. CUSHMAN,
Assistant United States Attorney,
Appearing for and on Behalf of Plaintiff.

RICHARD M. THATCHER, ESQ.,
Appearing for and on Behalf of Defendant.

The Court: I would like to know if counsel in Cause No. 3352, United States of America, Plaintiff, vs. Aerial Lumber Company, Defendant, are ready to proceed with that trial?

Mr. Cushman: Yes, your Honor.

Mr. Thatcher: Yes, your Honor.

(Discussion re defendant's trial memorandum.)

The Court: Now, you may make your statement, Mr. Thatcher.

Mr. Thatcher: I have previously told Mr. Cushman that this memorandum was prepared on Monday. Since Monday, I have talked to Mr. Ross, [2*] who is here in the courtroom, an employee of the Seattle Public Housing Authority and who has information with respect to these items, and Mr. Baker and I have determined in my own mind that I will not be able to carry the burden of proof in connection with the affirmative defense and will offer no testimony upon it. It may be considered as waived and withdrawn, and that might perhaps save your Honor——

The Court: Very well.

(Further discussion re defendant's trial memorandum.)

The Court: Now, I wish to proceed as soon as we can with this trial so as to save all the time we can. Was there something else you wished to say that should be said now?

Mr. Cushman: Well, your Honor, I would like to say that Mr. Thatcher and I are agreed about all the facts. I will be presenting various documents, and the pleadings have admitted the great majority of them.

The Court: We are now referring to Cause No. 3352, United States of America, Plaintiff, vs. Aerial

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Lumber Company, Defendant, and we have been speaking of that at all times. Now, [3] at this time, counsel having announced that they are ready to proceed with the trial, the Court will hear the opening statement of the plaintiff, if he wishes to make an opening statement. If he does not wish to do so, the Court will hear counsel in respect to any other phase of the case, or if counsel feels that something else before the opening statement should be said regarding the pleadings and issues, counsel may now make such statement. However, I wish you would finally indicate your attitude concerning the making or not making of plaintiff's opening statement.

Mr. Cushman: Well, your Honor, I would like to make a very brief statement.

The Court: Very well. Now, I wish you to make a statement as to the state of the pleadings or issues at this time before you do that.

Mr. Cushman: Your Honor, the documents in this case are somewhat complicated. However, all documents that will be admitted in the first stage are admitted by the pleadings. The execution and delivery of those documents is acknowleged by the pleadings and, basically, we have a straight contract case. [4]

The defendant, Oceanic Lumber, which is now Aerial Lumber, presented an offer to the Public Housing Administration, an offer for the purchase of certain buildings. Now, the buildings in question are in two groups. There are three buildings in a project here in Seattle. These were surplus build-

ings which were sold by the Public Housing Agency. One building was in an Everett housing project. The documents which I will present are split into those two groups, three buildings in one and one building in the other.

The Oceanic or Aerial Lumber Company presented an offer. Along with the offer was a deposit securing the offer. The offer was accepted by the Public Housing Administration. Now, that is all one form, the Offer and Acceptance of Offer. This form refers, in turn, to one Invitation to Bid, which in each case is identical in its substantive information. The only difference between the two groups of buildings is the difference in designation of the buildings, and in each case there are also general conditions which are made a part of the agreement by reference. [5]

The contract was awarded, and Oceanic—or Aerial—failed to live up to the terms of the contract. After notice of their default, the buildings were readvertised and a subsequent sale was held.

The amount of the damage in this case is the amount of the original bid on all four buildings less the deposit which was forfeited to the Government, less the price received on resale.

The Court: Received by whom on resale?

Mr. Cushman: Received by the Public Housing Authority on the resale of these four buildings, and in addition is added as an item of expense the cost of readvertising the buildings. Now, that is the total amount requested. It is set forth in a certificate of settlement which also was served on defend-

ant along with the pleadings. At this time I believe —now, counsel, will you check me—I believe that defendant's counsel will admit the figures in the certificate of settlement from the General Accounting Office. He will not challenge those, but he challenges the legal effect of the certificate of settlement.

The Court: As I understand, your statement means that if the defendant is liable, the [6] defendant has no quarrel with the accuracy of the figures or statement made in the certificate of settlement.

Mr. Cushman: I believe that is right.

The Court: Is that right?

Mr. Thatcher: That is correct.

The Court: Now, we will hear at this time or later in the conduct of the trial the defendant's opening statement.

Mr. Thatcher: If the Court please, there are two elements to the defense of the defendant in this case. One involves paragraph 2 of the General Conditions which Mr. Cushman said, and I believe it is a correct statement, were incorporated in the Offer and Acceptance of Offer by appropriate language in the document signed by the person on behalf of the defendant.

In paragraph 2, there is the statement:

"The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security."

The documents which I understand the [7] Gov-

ernment intends to offer in evidence here will be resisted as to their legal effect as a determination by the contracting officer under that paragraph. I believe the evidence will show that there was no communication of any determination to the defendant and that the documents themselves do not purport on their face to be such a determination pursuant to the terms of the contract.

It is the further position of the defendant that the determination or the information contained in those documents is erroneous as a matter of law.

In the same paragraph, paragraph 2, there is this language:

"The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition."

There is another paragraph of the General Conditions that bears upon this matter, being paragraph 6, which again refers to what should happen in the event the purchaser fails to complete the [8] removal and clean-up, and it talks about the Government charging the purchaser with the cost of removing the dwellings and cleaning up the site.

Now, all of the evidence in this case offered by the Government to which objection will be made goes to an element which I would describe—and I think is properly described—as loss of profit. That is the difference between our bid and the amount received on rebid, which it is our position is not an expense under the very terms of the contract, the

parties having described in their contract the items of damage that they were talking about, and if the Court follows the contract, it may award the Government any expense but not loss of profits.

Now, the Government received the bid security in the amount of, I believe, around $350.00. Their costs on resale were around $50.00. There is no cross-complaint, and insofar as the defendant is concerned, the Government has no loss occasioned by expense.

The Court: You may call the first witness for the plaintiff or otherwise proceed with the plaintiff's case in chief. [9]

Mr. Cushman: I wish to submit as exhibits, the documents attached to the complaint.

The Court: Do you have copies of them?

Mr. Cushman: Yes, I do, and I thought it might be helpful to the Court——

The Court: You ought to have something in the files to keep from changing the state of the files. Will the offer of copies accomplish that?

Mr. Cushman: Well, your Honor, these are the copies of the documents attached to the complaint.

The Court: I will let you have the Court's file in case it is needed. Let opposing counsel compare the two and see if he is agreeable to the use of copies or whether he insists that the originals be used as exhibits instead of copies. If he does insist upon it, the Clerk will withdraw from the files the original exhibits for the purpose of having them marked and identified.

(The Court's file is handed to Mr. Cushman who confers with Mr. Thatcher.)

Mr. Cushman: Your Honor, may I have this exhibit marked Plaintiff's Exhibit 1?

The Clerk: Plaintiff's Exhibit No. 1. [10]

(Contractual documents re Seattle sale marked Plaintiff's Exhibit No. 1 for identification.)

The Court: And what do you say is the kind of thing Plaintiff's Exhibit 1 is? Try to make a statement which you believe will be acceptable to opposing counsel.

Mr. Cushman: Plaintiff's Exhibit 1, your Honor, begins with a statement and certificate of award, which is merely a form of the Public Housing Authority which acknowledges that an award has been made. Page 2 of Exhibit 1 is the actual offer signed by the defendant and countersigned——

The Court: What I am trying to do is to get you to assign to this exhibit a name which in the future would clearly distinguish it, if somebody called it by that name, from each and every other exhibit in the case. Can you give it such a name?

Mr. Cushman: Your Honor, Plaintiff's Exhibit 1 could be called the contractual documents in connection with the Seattle sale.

The Court: Then I guess they are the contractual documents?

Mr. Cushman: Yes, your Honor. [11]

The Court: Is there any objection to such a statement in connection with them?

Mr. Thatcher: No, your Honor; no objection to their admittance.

The Court: They purport to be photostatic

copies, Plaintiff's Exhibit 1. Do you wish to offer it now?

Mr. Cushman: May it be offered?

The Court: It is now admitted.

(Plaintiff's Exhibit No. 1 received in evidence.)

PLAINTIFF'S EXHIBIT No. 1
(Admitted August 4, 1954)

Statement and Certificate
of Award

Standard Form No. 1036—Revised

Contract No. (Wash-45245)
Date Nov. 5, 1948.

(Department or establishment): Housing & Home Finance Agency.
(Bureau or office): Public Housing Administration.
(Location): San Francisco 2, Calif.

Method of or Absence of Advertising
(Section 3709 of the Revised Statutes)

1. After advertising in newspapers.

2. (a) After advertising by circular letters sent to ..... dealers.

(b) And by notices posted in public places.

(If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate below must be "2(a)(b)" or "2(a)," depending on whether or not notices were posted.)

Plaintiff's Exhibit No. 1—(Continued)

3. Without advertising under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.

4. Without advertising in accordance with .....

5. Without advertising, it being impracticable to secure competition because of .....

.....

(Here state circumstances under which the securing of competition was impracticable.)

Award of Contract

A. To lowest bidder as to price (Expenditures).

B. To other than the lowest bidder as to price (Expenditures).

C. To highest bidder as to price (Receipts).

D. To other than the highest bidder as to price (Receipts).

Certificate

I Certify that the foregoing statement is true and correct; that the agreement was made in consequence of No. 1 of the method of or absence of advertising and in accordance with award of contract lettered C, as shown above; that the total number of bids received is (see below), and that where lower bids (expenditure contracts) or higher bids (receipt contracts) as to price were received a statement of reasons for their rejection, together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate

Plaintiff's Exhibit No. 1—(Continued)

sheet attached hereto; that the articles or services covered by the agreement (expenditure) are necessary for the public service, and that the prices charged are just and reasonable.

WASH-45245, Building No. 10

Awarded to:

Oceanic Lumber & Wrecking Co. . $1,200.00

Other bidders:

Matheny & Bacon	431.75
Thomas M. Tokareff	423.00
Cook and Abel	267.00

WASH-45245, Building No. 20

Awarded to:

Oceanic Lumber & Wrecking Co. . $1,600.00

Other bidders:

Matheny & Bacon	491.50
Cook and Abel	267.00

WASH-45245, Building No. 24

Awarded to:

Oceanic Lumber & Wrecking Co. . $ 800.00

Other bidders:

Thomas M. Tokareff	278.00
Matheny & Bacon	245.75
Cook and Abel	201.00
Eugene M. Odermat	150.00

(Signature of Contracting Officer):

/s/ M. C. REDMAN,

Director, Area A.

Plaintiff's Exhibit No. 1—(Continued)

Note.—This statement and certificate will be used to support all agreements, both formal contracts and less formal agreements of whatever character, involving the expenditure or receipt of public funds. It must be executed and signed by the contracting officer (unless the award is made by or is subject to approval by an officer other than the contracting officer, when execution and signature may be made by such officer).

Housing and Home Finance Agency
Public Housing Administration

Offer and Acceptance of Offer

Date: October 20, 1948.

Project No. WASH-45245
Seattle, Washington
To: Director, Area A

Public Housing Administration
760 Market Street
San Francisco 2, California

1. The undersigned, hereinafter referred to as the "Purchaser" has been furnished by the United States of America, acting through the Public Housing Administration, a constituent of the Housing and Home Finance Agency, hereinafter referred to as the "Seller," with a copy of the General Conditions, and the Invitation to Bid, setting forth the conditions under which the property will be sold.

Plaintiff's Exhibit No. 1—(Continued)

2. The Purchaser offers and agrees to purchase from the Seller the property set forth and described in the Invitation to Bid attached to the General Conditions, such offer being governed by and subject to the General Conditions covering the sale of such property, at the following purchase price:

Building Number:	10	$1,200.00
	20	1,600.00
	24	800.00

3. The Purchaser transmits herewith a certified or cashier's check or money order in the amount of Two Hundred Eighty Dollars ($280.00) payable to the Housing Authority of the City of Seattle to be held and applied as set forth in the Invitation to Bid.

4. This offer shall be binding upon the purchaser, his (its) successors and assigns in the manner and for the period, and may be accepted by the Seller, all as set forth in the General Conditions and the Invitation to Bid.

5. The Government reserves the right as its in-

Plaintiff's Exhibit No. 1—(Continued)

terests may require, to reject all bids and to waive informalities in bidding.

OCEANIC LUMBER &
WRECKING CO.,

/s/ E. A. CARLSON,
Purchaser.
10701 E. Marginal Way,
Seattle 88, Washington.

Witness:

.....

.....

Accepted by the Government subject to the General Conditions, November 5, 1948.

PUBLIC HOUSING
ADMINISTRATION,

By /s/ M. C. REDMAN,
Director, Area "A."

Housing and Home Finance Agency
Public Housing Administration
Housing Authority of the City of Seattle

Invitation to Bid

Project No. WASH-45245
Seattle, Washington

1. By notice first published on October 8, 1948, the United States of America, acting through the Public Housing Administration of the Housing and

Plaintiff's Exhibit No. 1—(Continued)

Home Finance Agency and the Housing Authority of the City of Seattle, has offered to sell the property hereinafter described, located at Seattle, Washington.

Temporary—Row Houses.

Item	Building	Description
Building No. 10	6 Units	3 Bedrooms Per Unit
Building No. 18	6 Units	2 Bedrooms Per Unit
Building No. 19	4 Units	2 Bedrooms Per Unit
Building No. 20	8 Units	2 Bedrooms Per Unit
Building No. 24	4 Units	2 Bedrooms Per Unit

Cabinet shower, lavatory, kitchen range, space heater, and icebox are to be sold with each unit.

2. The above-described property is offered subject to following priorities:

1. Federal agencies.
2. State and local governments.
3. Non-profit institutions.

Priority holders must meet the price established for property; otherwise their offers will be considered in competition with sealed bids from non-priority holders. In case of tie bids, preference will be given in order of priority and to veterans. Veteran preference is limited to purchase of one building.

3. Offers from priority holders and sealed bids from non-priority holders will be accepted until 2:00 p.m. Friday, October 22, 1948, at the office of the Housing Authority of the City of Seattle, 825 Yesler Way, Seattle 4, Washington, and then pub-

Plaintiff's Exhibit No. 1—(Continued)

licly opened. Bids in duplicate shall be enclosed in two envelopes (outer and inner), both of which shall be sealed and clearly labeled "Bid for Purchase and Removal" so as to guard against opening prior to the time set therefor.

4. Purchaser will provide the Housing Authority of the City of Seattle with a Performance Bond in the amount of $50.00 per dwelling unit as required under Paragraph 2 of the General Conditions.

5. All offers except those from federal, state or local government bodies shall be accompanied by a deposit securing the offer. Said deposit shall be in the form of a certified or cashier's check or money order payable to the Housing Authority of the City of Seattle and shall be in the amount of five (5) per cent of the bid up to $10,000 plus two (2) per cent of any amount in excess of $10,000. The amount of the deposits made by successful bidders in accordance with this Paragraph shall be applied against the purchase price. When an offer is accepted, the unsuccessful bidders will be so notified and the checks or money orders of all unsuccessful bidders shall be immediately returned to them. Checks or money orders may be held by the Public Housing Administration without deposit and at the bidder's risk until the successful bidders are selected.

Plaintiff's Exhibit No. 1—(Continued)
Housing and Home Finance Agency
Public Housing Administration
Housing Authority of the City of Seattle

General Conditions

1. The Property available for sale is described in the Invitation to Bid annexed hereto and made a part hereof.

2. Performance Security. The Purchaser shall within 5 days of the delivery to the Purchaser of an executed copy of the contract supply (in addition to payment in full of the contract price) performance security in the form of a certified check, cashier's check or United States Post Office Money Order payable to the Housing Authority of the City of Seattle in the amount required under Section 4 of the Invitation to Bid, or shall supply a performance bond in a like amount. The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security.

3. Scope. (a) The Purchaser shall furnish all labor and material, perform all work, and assume all expenses necessary to accomplish the following:

Plaintiff's Exhibit No. 1—(Continued)

(1) Demount and remove buildings with wood floors down to ground level, including wood, brick or concrete block foundation posts or piers (but not including poured concrete posts or foundations);

(2) Take down, preserve, and replace as directed, telephone, telegraph, or other wires or fences and their appurtenant poles or posts or other interferences which may obstruct the removal of the buildings; excepting those serving buildings not included in this contract;

(3) Have all services, such as water, gas, steam, electricity and telephones, disconnected at the service mains in accordance with the rules and regulations of the owners of the utility involved or the local municipality. Securely cap and seal all storm and sanitary sewers leading from structures to be demolished. Preserve all active utilities traversing the project site;

(4) Remove all salvage (except as specified herein) and debris resulting from the operation and all tools and apparatus from the site, restore the site of the buildings, as far as possible, to its condition immediately prior to the removal of the buildings by filling solidly any holes or trenches resulting from the operation and leave the site clean and free from hazards, all to the satisfaction and approval of the Contracting Officer.

Plaintiff's Exhibit No. 1—(Continued)

(b) In the performance of the foregoing work the Purchaser shall at all times provide adequate protection to persons and property, and to prevent spread of dust and flying particles; provide water and necessary connections therefor; and shall avoid interfering with the use of the adjacent buildings or interruption of free passage to or from the same.

(c) The Purchaser shall use no dynamite nor powder and do no blasting on the site and shall not burn materials or debris on the site without the specific permission of the Contracting Officer.

(d) Dwelling structures shall not be removed in an intact or substantially intact or substantially intact position but shall be disassembled to such an extent that the structural parts thereof are reduced to at least flat panels.

> "Title to any dwelling structures which are removed from the site without reducing same to at least flat panels is reserved in the United States of America and possession of such structures may be recovered by the government upon 10 days notice to the purchaser or his successors in interest. Such notice may be given within a reasonable time after discovery of the breach by the government."

4. Licenses and Permits. The Purchaser shall obtain and pay for all required permits, licenses and fees necessary in connection with its work, without cost or expense to the government.

The Court: Now you can make any reference to it desired by you. It is in evidence. If you want to read part of it, or call attention to all of it, whatever it is you wish to do, you may do.

Mr. Cushman: Well, your Honor, I just wish to point out that the second document in Plaintiff's Exhibit 1 is the offer of the defendant in this case, Oceanic Lumber & Wrecking Co., which is signed by Mr. Baker, their President, an offer to purchase Building Nos. 10, 20 and 24.

The Court: That is the offer to [12] purchase buildings is the second paper in Exhibit 1, is that right?

Mr. Cushman: Yes, your Honor.

The Court: You may proceed.

Mr. Cushman: Offer to purchase Buildings 10, 20 and 24 for a price which is designated in the offer across from the building numbers from the Public Housing Administration.

Paragraph 3 of that offer provides that:

"The Purchaser transmits herewith a certified or cashier's check or money order in the amount of Two Hundred Eighty Dollars ($280.00) payable to the Housing Authority of the City of Seattle to be held and applied as set forth in the Invitation to Bid."

Paragraph 4 provides this offer shall be—provides generally that this offer shall be binding upon the purchaser as provided in the General Conditions and Invitation to Bid.

Referring then to page 3 of Plaintiff's Exhibit 1——

The Court: I do not see any page 3.

Mr. Cushman: It is the third paper.

The Court: All right. You may proceed.

It is entitled at the top of the page "Housing and [13] Home Finance Agency, Public Housing Administration, Housing Authority of the City of Seattle, Invitation to Bid," is that what it is called?

Mr. Cushman: Yes, your Honor.

Paragraph 5 of that Invitation to Bid provides in general terms for the deposit which is mentioned in the Offer, the deposit of $280.00 which I mentioned previously, your Honor.

The Court: We are taking up too much time and are not getting very far. We will have to expedite the matter.

Mr. Cushman: Then, in addition, pages 4 and 5 are the General Conditions, which conditions will be discussed in the argument as to their effect on this contract.

I also wish to call your Honor's attention on page 2 of Plaintiff's Exhibit 1 to the signature of M. C. Redman, Director, Area "A," who signed on behalf of the Public Housing Administration accepting the offer.

The Court: Are there any other exhibits as to which you think counsel on both sides have the same attitude?

Mr. Cushman: Your Honor, may I have this exhibit marked Plaintiff's Exhibit No. 2? [14]

The Clerk: Plaintiff's Exhibit No. 2.

(Contractual documents re Everett sale marked Plaintiff's Exhibit 2 for identification.)

Mr. Cushman: Plaintiff's Exhibit No. 2 are copies of the contractual instruments which relate to the sale of one housing unit in Everett in the County of Snohomish. The documents concerned, except for the details as to the number of the house and the price are exactly identical—and dates, your Honor—are identical in general terms with the documents in Plaintiff's Exhibit 1.

The Court: What do the other contractual documents in Plaintiff's Exhibit 1 relate to?

Mr. Cushman: They relate to the sale of three housing units in Seattle, in King County.

The Court: And this relates to the sale of one housing unit or more in Everett?

Mr. Cushman: One housing unit in Everett.

The Court: You may proceed with something else. Do you want to take any steps to get it in evidence or do anything like that?

Mr. Cushman: May I offer Plaintiff's Exhibit No. 2 in evidence? [15]

The Court: Any objection?

Mr. Thatcher: No objection, your Honor.

The Court: Admitted.

(Plaintiff's Exhibit No. 2 received in evidence.)

PLAINTIFF'S EXHIBIT No. 2
(Admitted August 4, 1954)

Statement and Certificate
of Award

Standard Form No. 1036—Revised.

Contract No. HA(WASH-45073) dph-2
Date: November 10, 1948.

(Department or establishment): Housing and Home Finance Agency, Public Housing Administration.

(Bureau or office): Region I—Area A.
(Location): San Francisco, California.

Method of or Absence of Advertising
(Section 3709 of the Revised Statutes)

1. After advertising in newspapers.

2. (a) After advertising by circular letters sent to 15 dealers.

(b) And by notices posted in public places.

(If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate below must be "2(a)

(b)" or "2(a)," depending on whether or not notices were posted.)

3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.

4. Without advertising in accordance with .....

5. Without advertising, it being impracticable to

Plaintiff's Exhibit No. 2—(Continued)

secure competition because of .....

.....

(Here state circumstances under which the securing of competition was impracticable.)

Award of Contract

A. To lowest bidder as to price (Expenditures).
B. To other than the lowest bidder as to price (Expenditures).

C. To highest bidder as to price (Receipts).
D. To other than the highest bidder as to price (Receipts).

Certificate

I Certify that the foregoing statement is true and correct; that the agreement was made in consequence of Nos. 1, 2(a)(b) of the method of or absence of advertising and in accordance with award of contract lettered C, as shown above; that the total number of bids received is 4, and that where lower bids (expenditure contracts) or higher bids (receipt contracts) as to price were received a statement of reasons for their rejection, together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate sheet attached hereto; that the articles or services covered by the agreement (expenditure) are necessary for

Plaintiff's Exhibit No. 2—(Continued)

the public service, and that the prices charged are just and reasonable.

Building No. 5

Dickey & Clausen	$ 404.00
I. A. Welch	930.60
Cook & Abel	617.00
Oceanic Lumber & Wrecking Co.	1,500.00

/s/ M. C. REDMAN,
Director, Area A, Region I.

Note.—This statement and certificate will be used to support all agreements, both formal contracts and less formal agreements of whatever character, involving the expenditure or receipt of public funds. It must be executed and signed by the contracting officer (unless the award is made by or is subject to approval by an officer other than the contracting officer, when execution and signature may be made by such officer).

Plaintiff's Exhibit No. 2—(Continued)

PHA
RI-Area-23
2-19-48

Housing and Home Finance Agency
Public Housing Administration

Offer and Acceptance of Offer
Disposal Unit No. 1

Date: October 20, 1948.

Project No.: Wash 45073
Location: Everett, Wash.

To: Housing and Home Finance Agency
Public Housing Administration—Area A
760 Market Street
San Francisco, California

1. The undersigned, hereinafter referred to as the "Purchaser" has been furnished by the United States of America, acting through the Public Housing Administration, a constituent of the Housing and Home Finance Agency, hereinafter referred to as the "Seller," with a copy of the General Conditions, and the Invitation to Bid, setting forth the conditions under which the property will be sold.

2. The Purchaser offers and agrees to purchase from the Seller the property set forth and described in the Invitation to Bid attached to the General Conditions, such offer being governed by and subject to the General Conditions covering the sale of such property, at the following purchase price $250.00 per unit Dollars ($1,500.00).

Plaintiff's Exhibit No. 2—(Continued)

Building Number:

Preferable No. 5—or 3 or 4 or 6 or 7.

3. The Purchaser transmits herewith a certified or cashier's check or money order in the amount of Seventy-five Dollars ($75.00) payable to the Treasurer of the United States to be held and applied as set forth in the Invitation to Bid.

4. This offer shall be binding upon the Purchaser, his (its) successors and assigns in the manner for the period, and may be accepted by the Seller, all as set forth in the General Conditions and Invitation to Bid.

5. The Government reserves the right as its interest may require, to reject all bids and to waive informalities in bidding.

OCEANIC LUMBER &
WRECKING CO., INC.,
Purchaser;
/s/ WM. A. BAKER,
President.
10701 E. Marginal Way,
Seattle 88, Washington.

Witness:

.....

.....

Accepted by the Government subject to General Conditions for Building No. 5, November 10, 1948.

PUBLIC HOUSING
ADMINISTRATION,
By /s/ M. C. REDMAN,
Director, Area A, Region I.

I-6406

Plaintiff's Exhibit No. 2—(Continued)

PHA
RI-Area-22
2-19-48

Housing and Home Finance Agency
Public Housing Administration

Invitation to Bid

Project No.: Wash-45073
Location: Everett, Washington

1. By notice first published on October 6, 1948, the United States of America, acting through the Public Housing Administration of the Housing and Home Finance Agency, has offered to sell the property hereinafter described; located at Everett, Washington.

Temporary—Row Houses.

Item	Building	1-Bedroom Unit	2-Bedroom Unit	3-Bedroom
1	1		4	
2	2		4	
3	3	4		2
4	4	4		2
5	5	4		2
6	6	4		2
7	7	4		2
8	8		4	
9	9		4	
10	10		4	

2. The above-described property is offered subject to following priorities:

1. Federal Agencies.
2. State and Local Governments.
3. Non-Profit Institutions.

Plaintiff's Exhibit No. 2—(Continued)

Priority holders must meet the price established for property; otherwise their offers will be considered in competition with sealed bids from non-priority holders. In case of tie bids, preference will be given in order of priority. Veteran preference is limited to only one unit of purchase.

3. Offers from priority holders and sealed bids from non-priority holders must be submitted within 15 days from date of first advertisement as above set forth, and prior to the time for the opening of bids as set forth in the advertisement. Established price to priority holders and other information pertaining to this offering may be secured from Mr. Frank Spencer, Executive Director, Housing Authority of the City of Everett, Washington. Bids will be enclosed in separate sealed envelope addressed to the above and marked "Bid for Purchase and Removal."

4. Purchaser will provide the Public Housing Administration with a Performance Bond in the amount of $500.00 per building as required under paragraph 2 of the General Conditions.

5. All offers except those from federal, state or local government bodies shall be accompanied by a deposit securing the offer. Said deposit shall be in the form of a certified or cashier's check or money order payable to the Treasurer of the United States and shall be in the amount of five (5) per cent of the bid up to $10,000 and two (2) per cent of any amount in excess of $10,000. The amount of the deposits made by successful bidders in ac-

Plaintiff's Exhibit No. 2—(Continued)

cordance with this paragraph shall be applied against the purchase price. When an offer is accepted, the unsuccessful bidders will be so notified and the checks or money orders of all unsuccessful bidders shall be immediately returned to them. Checks or money orders may be held by the Public Housing Administration without deposit and at the bidder's risk until the successful bidders are selected.

[The General Conditions omitted from Plaintiff's Exhibit No. 2 are identical to General Conditions set forth in Plaintiff's Exhibit No. 1.]

Mr. Cushman: I would like to call Mr. Ross to the stand.

CHARLES W. ROSS

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cushman:

Q. Would you state your name and address?
A. My name is Charles W. Ross.
Q. And your address, please?
A. Office address or home?
Q. Office.
A. Office address is 825 Yesler Way.
Q. What is your position?

(Testimony of Charles W. Ross.)

A. I am the Executive Director of the [16] Housing Authority of the City of Seattle.

Q. Are you familiar with the sale of certain housing project units owned by the Public Housing to the Oceanic Lumber & Wrecking Company, now Aerial Lumber Company, which occurred in approximately October of 1948? A. I am.

Mr. Cushman: Will you mark that Plaintiff's Exhibit 3, please?

The Clerk: Plaintiff's Exhibit 3.

Mr. Cushman: Your Honor, may I have permission to substitute for that exhibit a certified copy of it?

The Court: Mr. Clerk, will you take Plaintiff's Exhibit 3; remove the Clerk's marks from it; and then substitute the other one offered by counsel as Plaintiff's Exhibit 3 and put the Clerk's marks on that?

(Certified copy of letter dated April 8, 1949, marked Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Cushman): Mr. Ross, you have been handed Plaintiff's Exhibit 3 for identification. Do you know what that document is? [17]

A. Yes. It is a copy of a letter that I wrote to Mr. M. C. Redman, who at that time was the Director of the Seattle Field Office of the Public Housing Administration.

Q. In very general terms, what did you set forth in the letter?

The Court: Now, wait just a moment. What

(Testimony of Charles W. Ross.)

subject, if any, was discussed in the letter? Was there a subject discussed in the letter?

The Witness: Yes. It was the loss the Government had suffered by reason of the default of the Oceanic Lumber Company.

Mr. Thatcher: I object——

The Court: Just a minute. You cannot state the contents of the letter. Just state the subject under discussion in the letter. Losses under the contract, is that what was discussed in the letter?

The Witness: Yes. The contents of the letter——

The Court: No. That is enough. Ask him another question.

Q. (By Mr. Cushman): What transaction was involved? What does the letter concern?

A. It concerns the original bids received on [18] certain buildings in the Taylor Avenue Homes project and the bids received on the reoffering of those buildings, and the difference between them.

Q. And what bidder is the letter concerned with?

A. It is concerned primarily with the Oceanic Lumber & Wrecking Company.

Mr. Cushman: I move the admission of that letter, Plaintiff's Exhibit 3.

Mr. Thatcher: May I make one inquiry of the witness?

The Court: You may on voir dire.

Mr. Thatcher: Yes, sir.

(Testimony of Charles W. Ross.)

Voir Dire Examination

By Mr. Thatcher:

Q. Mr. Ross, were you the contracting officer on April 8, 1949?

A. I was a representative of the contracting officer.

Mr. Thatcher: If the Court please, I believe that Exhibit 3 will be immaterial and irrelevant to the inquiry before the Court at this time. Now, the information contained in [19] the letter as to figures and amounts is available through another exhibit which I have already indicated to your Honor that I will read to you, that is——

The Court: Well, do you make the point that the one you are going to offer serves better the purpose which you believe plaintiff has in mind or what causes you to make the statement?

Mr. Thatcher: This letter contains conclusions of Mr. Ross with respect to the legal significance of the events regarding the Seattle units, the three Seattle units. It contains certain other information, but the letter is not a determination by a contracting officer and is, therefore, Mr. Ross' hearsay statement to Mr. Redman as to his conclusions with respect to the actions of the defendant and the Government in this case.

The Court: I will hear further testimony. If its admissibility is objected to, you will have to establish admissibility.

I understand this letter was not addressed to

(Testimony of Charles W. Ross.)

any one representing the defendant but it was addressed to some public official representing the same plaintiff which is now the party in [20] this action.

Mr. Cushman: That is right, your Honor.

The Court: That both the addressor and addressee of this communication were at the time in the employ of the plaintiff.

Mr. Cushman: That is right, your Honor.

The Court: Proceed.

Direct Examination
(Continued)

By Mr. Cushman:

Q. Mr. Ross, what was the first contact you had with the situation we are discussing, with the purchase by Aerial Lumber of certain buildings in your area?

A. The first contact I recall was in the actual opening of the bids received at the time set for it, which I don't at the moment recall.

Q. State, if you know, who the successful bidder was.

A. The successful bidder on these three buildings was the Oceanic Lumber & Wrecking Company.

Q. When did you next have any contact with the Oceanic contract?

A. The evidence in the files indicates that I had contact with them, of which there is no specific [21] record in our files, some time within a week or so after the bids were opened.

Q. And what information did you get from them

(Testimony of Charles W. Ross.)

and what action did you take?

A. I can answer the first question better. The information I got from them was an indication that they were not going to fulfill their contract by paying the balance and removing the buildings.

Mr. Thatcher: I beg your pardon, Mr. Ross.

The Court: Read the answer, all of it.

(The last answer is read by the reporter.)

Q. (By Mr. Cushman): Where did you get that information, physically?

A. To the best of my recollection, it was at a meeting in my office at 825 Yesler Way.

The Court: Well, now, that suggests the further disclosure as to who was present, etc. I still do not know whether it is hearsay. Do you not see that?

Mr. Cushman: Yes, your Honor.

Q. (By Mr. Cushman): State, if you know, who was present in your office at the time of the conversation you just referred to.

A. I cannot recall. [22]

The Court: State, if you know, whether anybody representing the defendant was present.

The Witness: Yes.

The Court: Who was it, if you know?

The Witness: I couldn't say with absolute certainty, but I can assume from subsequent events that it was Mr. Baker.

The Court: Now you can say what was said, if counsel wishes you to do so. You can say what

(Testimony of Charles W. Ross.)

was said then and there by Mr. Baker and by you or by any other person. Was there any other person present besides you and Mr. Baker?

The Witness: I do not recall.

The Court: Then if counsel wishes to do it, on proper question you may inquire as to what was said or done.

Mr. Cushman: I believe he answered he did not know, your Honor.

The Court: I do not think so. You either misunderstood him or the Court did. He said he did not recall who else, if any one, was present. That is the effect of my understanding of his statement.

Q. (By Mr. Cushman): What was said at the time of this conversation? [23]

The Court: That means what did you say and what did Mr. Baker say. Will you please try to say what each one said?

A. That, at this late date, I cannot do. I can't remember.

Q. Well, what do you remember, in general terms, of the effect of the conversation?

A. In general terms, it was an indication that——

The Court: By whom?

The Witness: By Mr. Baker.

A. (Continued): that the Oceanic Lumber & Wrecking Company was not going to go through with their offer, completion of their offer, by completing the payment and removing the buildings, and to the best of my recollection, questions were

(Testimony of Charles W. Ross.)

asked me of what the effect of their failure to go through would be.

Q. And did you answer that?

The Court: By whom? Was asked you by whom, if you know?

The Witness: By Mr. Baker; by a representative of the Oceanic Lumber & Wrecking Company whom I believe was Mr. Baker.

Q. (By Mr. Cushman): And did you answer that question at that [24] time?

A. I answered that question that there was no question but that the bid deposit would be lost to the Oceanic Lumber & Wrecking Company and, further, that they would be liable for any difference between what the Government received on a subsequent sale or sale to the second bidder.

Q. Did you follow through on this conversation in any way? A. Yes.

Q. How?

A. By reporting these facts to the Public Housing Administration office in San Francisco.

The Court: Did you have any obligation to do that so far as your employment and carrying out your duties of employment were concerned?

The Witness: Yes.

The Court: You may inquire.

Q. (By Mr. Cushman): Did you have any contacts in writing with the defendant after that conversation last mentioned?

A. Yes. After the contract was accepted by the Government, they were forwarded to me for sub-

(Testimony of Charles W. Ross.)

mittal to the Oceanic Lumber & Wrecking Company with the request that they fulfill the conditions of the contract by the [25] payment, and the completion of the payment, and providing a performance bond. Upon receiving those instructions, I took, personally, to the office of the company a copy——

The Court: The defendant?

The Witness: Oceanic Lumber & Wrecking Company.

A. (Continued): their copy of the accepted contract and a letter of transmittal which I asked for and received acknowledgment of the receipt of that contract.

The Court: Do you wish to show him anything in connection with this last statement?

Mr. Cushman: (No answer.)

The Court: Then you may proceed, Mr. Cushman. Let us get this under way.

Q. (By Mr. Cushman): Did you have occasion to correspond with the defendant after that day?

A. No.

The Court: Are you going to ask this witness anything about Plaintiff's Exhibit 3? That was the thing that was before the Court when we started to examine this witness with respect to the last subject matter. Can you manage in some way to bring home to this witness whatever it is you intended to? [26]

Q. (By Mr. Cushman): Referring you now to Plaintiff's Exhibit 3, do you know who prepared that? A. Yes. I did.

(Testimony of Charles W. Ross.)

Q. And did you prepare it from your own knowledge?

A. My own knowledge and reference to the data pertaining to the matter we have on file.

Q. And what does that letter show?

The Court: You cannot say that. The letter is not in evidence.

May I ask you, Mr. Ross, is there or is there not in your course of action any connection between Plaintiff's Exhibit 3 and the conversation you have just been mentioning as one which you had with Mr. Baker? Will you answer yes or no?

The Witness: I think there is a connnection, sir.

The Court: What is it? When was this Exhibit 3 created, if you know, with reference to the occasion of your conversation with Mr. Baker about which you have testified?

The Witness: I don't know as I quite follow you, sir.

The Court: Well, I cannot lead you. [27]

You may have the privilege of asking another question, and I do not wish to take up much more time with this.

Mr. Cushman: I am sorry, your Honor.

Q. (By Mr. Cushman): At what period in the transaction was this letter prepared?

A. This letter was prepared subsequent to the resale of the buildings in question and their removal from the project. I might add that it was, to the best of my recollection, requested of me by the

(Testimony of Charles W. Ross.)
disposition officer of the Public Housing Administration.

Q. For what purpose?

A. To give them a summary of the data for the purpose of considering suit against the Oceanic Lumber & Wrecking Company.

Mr. Cushman: Your Honor, I move the admissibility of Plaintiff's Exhibit 3.

Mr. Thatcher: I should like to still insist on my objection, your Honor.

The Court: The objection is sustained with the privilege of connecting it up in some way with the defendant. It ought to be connected up some way. The mere fact that it was done within the course of his official [28] duty in employment does not up to this time, in my opinion, sufficiently establish admissibility. If it was done pursuant to some negotiations with the defendant by some official, and if afterwards the contents of it were brought to the attention of the defendant, or if, in pursuance of it, some course of action was taken by some one, and that course of action was brought to the attention of the defendant—something else is needed to establish admissibility, in my opinion, and I do wish you would proceed because I think you should have been prepared to proceed with these simple matters more expeditiously.

The Court at this time will be at recess five minutes.

(Recess.)

(Testimony of Charles W. Ross.)

The Court: You may resume the interrogation of the witness.

Mr. Cushman: I would like to have this letter marked as Plaintiff's Exhibit No. 5.

The Clerk: No. There has been no Plaintiff's Exhibit No. 4. This will be marked Plaintiff's Exhibit No. 4.

(Letter dated Nov. 9, 1948, marked Plaintiff's Exhibit 4 for identification.) [29]

Q. (By Mr. Cushman): Mr. Ross, state if you know what that letter is. That is Plaintiff's Exhibit 4.

A. This exhibit is a copy of the letter which I delivered in person to the Oceanic Lumber & Wrecking Company, along with their copy of the accepted contract, which I asked that the receipt be acknowledged by countersigning this copy.

Q. And is there such receipt?

A. Yes. It is signed by William A. Baker.

Q. And what transactions were involved?

A. In this letter?

Q. What transactions does the letter concern?

A. This letter concerns the delivery of the contract for the purpose of the three buildings.

Q. No. No. I am just identifying the letter. I would like to know what buildings does it concern or who are the parties?

A. It concerns the sale of the three buildings by the Government to the Oceanic Lumber & Wrecking Company.

(Testimony of Charles W. Ross.)

Mr. Cushman: Your Honor, I move the admission of this letter.

The Court: Any objection?

Mr. Thatcher: I have no objection, your Honor. This relates to Exhibit 1, that is to [30] three Seattle units.

The Court: Admitted.

(Plaintiff's Exhibit No. 4 received in evidence.)

PLAINTIFF'S EXHIBIT No. 4

Housing Authority of the City of Seattle
825 Yesler Way
Seattle 4, Washington

November 9, 1948.

Oceanic Lumber & Wrecking Company,
10701 East Marginal Way,
Seattle 88, Washington.

Gentlemen:

I enclose herewith an accepted copy of the contract for the purchase of Buildings Nos. 10, 20 and 24, of Project No. WASH-45245. There is a balance of $3,320 due on this contract. Will you kindly arrange to make the final payment and furnish performance bond as specified in the General Conditions, attached to and made part of the contract.

Will you please acknowledge receipt of this letter

(Testimony of Charles W. Ross.)

and the enclosed contract by signing and returning the two copies of this letter.

Sincerely yours,

CHARLES W. ROSS,

Executive Director.

CWR:PL

Receipt acknowledged: November, 1948.

/s/ WM. A. BAKER.

Admitted in evidence August 4, 1954.

Mr. Cushman: I wish to have this entered. This is to show that demand was made.

(Letter dated Nov. 15, 1948, marked Plaintiff's Exhibit No. 5 for identification.)

Mr. Cushman: Plaintiff's Exhibit No. 5, your Honor, was presented to me by defendant's counsel.

The Court: As bearing upon what?

Mr. Cushman: It has a bearing on Plaintiff's Exhibit No. 2, on the contractual arrangement at Everett.

The Court: Do you offer it?

Mr. Cushman: I offer it, your Honor, as proof showing that a demand was made on Oceanic.

The Court: Any objection?

Mr. Thatcher: No objection, your Honor. This letter is from the original files of the defendant and

(Testimony of Charles W. Ross.)
was received by the defendant. [31]

The Court: It is admitted.

(Plaintiff's Exhibit No. 5 received in evidence.)

PLAINTIFF'S EXHIBIT No. 5

Housing Authority of the City of Everett,
Washington
General Offices
Baker Heights Addition
Everett, Washington

November 15, 1948.

Oceanic Lumber and Wrecking Co., Inc.,
10701 East Marginal Way,
Seattle 88, Washington.

Attention: Mr. William A. Baker.

Dear Sir:

Please be informed that signed copy of the contract for the purchase of building #5, Project Wash. 45073 has been returned to my office and will be delivered to you upon payment of balance due on contract.

We are very desirous that you take care of this matter as soon as possible in order that you may

(Testimony of Charles W. Ross.)

expedite removal of the buildings as per your agreement in said contract.

Very respectfully yours,
HOUSING AUTHORITY OF
THE CITY OF EVERETT,

/s/ S. FRANK SPENCER,
Executive Director.

SFS:glh

[Envelope]

[Postmark]
[Cancelled 3 cent Stamp.]
[Postmark]: 7:30 p.m., Nov. 15, 1948;
Everett, Wash.

[Return Address]:

After 5 days, return to
Housing Authority
of the City of Everett,
1131 Rainier Ave.,
Everett, Washington.

[Addressed to]: Oceanic Lumber and Wrecking Co.
10701 East Marginal Way,
Seattle 88, Wash.
Att: Mr. William A. Baker.

Admitted in evidence August 4, 1954.

Mr. Thatcher: It is a letter informing the defendant of the award of the contract on Exhibit 2 items, the Everett item.

(Testimony of Charles W. Ross.)

Mr. Cushman: May I have this marked Plaintiff's Exhibit 6, please?

The Clerk: Plaintiff's Exhibit 6.

(Copy of Certificate of Settlement marked Plaintiff's Exhibit No. 6 for identification.)

Mr. Cushman: Pursuant to stipulation, your Honor, Plaintiff's Exhibit 6, which is the Certificate of Settlement made by the General Accounting Office, concerns all the buildings both in the Everett and the Seattle area that are involved in this transaction and is a demand letter to defendant. The defendant, I believe, will admit the truth of all of the figures. I wish to move the admissibility of Exhibit 6, your Honor.

Mr. Thatcher: May I ask counsel is that [32] a certified copy of the last two pages attached to the exhibits of the complaint?

Mr. Cushman: Yes, it is a copy. It is not a certified copy.

Mr. Thatcher: That is all right. I have no objection as to authenticity.

The Court: It is admitted.

Mr. Thatcher: Just a minute. I have objection to its offer on a general basis, in that any of the conclusions contained in the letter having the words, "defaulted," "loss," "due," "settled," etc., anything like that in connection with the action of the General Accounting Office are conclusions of that office and not binding upon this Court or the defendant.

(Testimony of Charles W. Ross.)

The Court: The objection is overruled. Plaintiff's Exhibit 6 is now admitted.

(Plaintiff's Exhibit No. 6 received in evidence.)

PLAINTIFF'S EXHIBIT No. 6

(Copy)

Certificate of Settlement
General Accounting Office

Claim No. Cont-Z-170996-TSP.

Washington 25, April 3, 1950.
Certificate No. U.S. 50218.

Oceanic Lumber & Wrecking Company, Debtor,
10701 East Marginal Way,
Seattle 88, Washington.

I certify that I have examined and settled the claims(s) of the United States against the person named above for loss sustained by the Government by reason of debtor's default under contracts No. (Wash-45245), dated November 5, 1948, and No. HA (Wash-45073) dph-2, dated November 10, 1948,

(See attached sheet.)

and find the sum of Two Thousand Seven Hundred Twenty-three dollars and seventy cents is due the United States from the above-named debtor(s), to be deposited to the credit of 866523 Deposits, Disposition or Removal, War Housing Program, Public Housing Administration, Housing and Home Finance Agency.

(Testimony of Charles W. Ross.)

The amount found due should be remitted to this office promptly by check, draft, or money order(s) payable to "Treasurer of the United States."

LINDSAY C. WARREN,
Comptroller General of the
United States,

By LOUIS GERTLER.

$2,723.70.

Copy to: Housing and Home Finance Agency,
Public Housing Administration,
Washington 25, D. C.

Re: FISCAL:MAS:CA-2.

The debtor agreed to purchase Government-owned buildings known as Nos. 10, 20, and 24, located at Seattle, Washington, Project Wash-45425 for a total bid cost of $3,600, on which it made a deposit payment of $280.

By contract No. HA (Wash.-45073) dph-2, the debtor agreed to purchase Government-owned Building No. 5, located at Everett, Washington, Project, Wash-45703 for a total bid cost of $1,500, on which it made a deposit payment of $75.

The debtor defaulted under its contracts and the buildings were later advertised and resold, resulting in a loss to the Government in the amount of $2,-723.70, as shown by the following statement:

Project WASH-45245:

Building	No. 10	$1,200.00
"	No. 20	1,600.00
"	No. 24	800.00
	Total Bid	$3,600.00

Resale:

Building	No. 10	$ 460.50
"	No. 20	560.00
"	No. 24	355.00
	Total Resale	$1,375.50

Recap:

Total Bid	$3,600.00
Total Resale	1,375.50
Difference	$2,224.50
Cost of Resale	39.20
Net Loss	$2,263.70
Less Deposit	280.00
Total Loss	$1,983.70

Project WASH-45073:

Building No. 5	$1,500.00	Total Bid	$1,500.00
		Resale	700.00
		Difference	$ 800.00
		Cost of Resale	15.00
		Net Loss	$ 815.00
		Less Deposit	75.00
		Total Loss	$ 740.00

Loss under Default:

Project No. WASH-45245	$1,983.70
" " WASH-45073	740.00
Due the Government	$2,723.70

Admitted in evidence August 4, 1954.

Exhibit 6 in this action and prayed for in the prayer

The Court: I would like you to state again—Plaintiff's Exhibit 6 is a letter from the Accounting Office, is that right, a copy of letter from the Accounting Office, to whom?

Mr. Cushman: It is a copy, your Honor, [33] of a Certificate of Settlement made by the General Accounting Office and addressed to Oceanic Lumber & Wrecking Company, which is the defendant in this case.

The Court: Well, it was not a settlement unless it was agreed to by them. Did they agree to it or endorse on it anything of the sort?

Mr. Cushman: Your Honor, this is merely by way of a demand letter.

The Court: Then it is a copy of a letter from the Accounting Office to defendant, is that right?

Mr. Cushman: Yes, your Honor.

The Court: You may proceed.

Mr. Cushman: I believe that is all. I wanted to get those in before we excused Mr. Ross.

The Court: Did you intend or are you advisedly omitting any further questions of this witness regarding Plaintiff's Exhibit 3?

Mr. Cushman: I am purposely omitting it, your Honor.

The Court: Very well. You may cross-examine this witness. [34]

Cross-Examination

By Mr. Thatcher:

Q. Mr. Ross, was there any discussion between

(Testimony of Charles W. Ross.)

you and Mr. Baker, relative to what would happen with respect to the bid deposit in the event on a rebid, more was received than the bid of Oceanic?

A. I don't recall any discussion on that particular phase.

Mr. Thatcher: I have no further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Cushman: Your Honor, I believe with those documents the Government's case is complete.

The Court: Do you wish to rest?

Mr. Cushman: Yes, your Honor.

The Court: The defendant may proceed with its case in chief.

Mr. Thatcher: The defendant has no testimony to offer, your Honor.

The Court: Does the defendant now rest?

Mr. Thatcher: The defendant rests, also.

(Arguments made by counsel on behalf of plaintiff and defendant.) [35]

The Court: I do not see any conflict here, counsel, between the rights pursued by the Government in this case, and additional rights referred to by defendant's counsel in his argument. More especially I do not see, by reason of the matters and things pointed out in the defendant's argument, any basis for objection to the recovery by the plaintiff in this action of the items sued for an indicated as owing from the defendant to the plaintiff in Plaintiff's

(Testimony of Charles W. Ross.)

of the complaint.

It is the finding, conclusion and decision of the Court from a preponderance of the evidence in this case, that the plaintiff has sustained its burden of proof in respect to the material allegations of its complaint in this action and that it is entitled to recover of and from the defendant the sum of $2,723.70, together with interest thereon at the rate of 6% per annum from April 3, 1950, until the date of entry of the judgment, and is thereafter entitled to interest on the judgment at the legal rate, and is further entitled to recover its taxable costs and disbursements herein. [36]

The Court further finds, concludes and decides that the defendant take nothing by its affirmative defense herein.

Is there any other issue not covered by the Court's orally announced decision?

Mr. Cushman: No, your Honor.

Mr. Thatcher: None that the defendant is aware of, your Honor.

The Court: When can counsel conveniently meet with the Court for the purpose of settling and entering proper findings of fact, conclusions of law and judgment?

Mr. Cushman: Would Monday be possible?

The Court: Yes, it would be possible.

Will counsel in this case prepare suitable findings of fact and conclusions of law and serve them on opposing counsel before Monday?

The Court continues this case until Monday morn-

ing at 10:00 o'clock, August 9, 1954, for the purposes mentioned. Both counsel are excused until then.

(At 12:10 o'clock p.m., August 4, 1954, trial proceedings concluded.) [37]

Certificate

I, Frances I. Gilligan, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ FRANCES I. GILLIGAN,
Official Court Reporter.

[Endorsed]: Filed October 19, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and

Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original documents, excluding exhibits, in the file dealing with the above cause, as the record on appeal herein from the judgment for plaintiff filed Aug. 16, 1954, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed Jan. 27, 1953.

2. Summons with Marshal's Return thereon, filed Jan. 30, 1953.

3. Answer of Defendant, filed May 5, 1953.

4. Praecipe, Govt. for subpoena, Ross, filed Aug. 4, 1954.

5. Defendant's Trial Memorandum, filed Aug. 4, 1954.

6. Marshal's Return on Subpoena, Ross, filed Aug. 12, 1954.

7. Findings of Fact and Conclusions of Law, filed Aug. 16, 1954.

8. Judgment, filed Aug. 16, 1954.

9. Cost bill, filed Aug. 16, 1954.

10. Notice of Appeal, filed Sept. 14, 1954.

11. Cost Bond on Appeal, filed Sept. 22, 1954.

12. Court Reporter's Transcript of Proceedings at Trial, filed 9-28-54.

I further certify that the following is a true and

correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, $5.00, and that said amount has been paid to me by counsel for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 18th day of October, 1954.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith, supplemental to the record on appeal in the above cause, the following additional papers or documents dealing with the action, to wit:

13. Designation of Contents of Record on Appeal, filed Oct. 19, 1954.

14. Statement of Points upon Which Defendant Intends to Rely, filed 10-19-54.

15. Court Reporter's Transcript of Proceedings at Trial, filed Oct. 19, 1954. (This is the original of Document No. 12.)

16. Order Directing Transmission of Original Exhibits, filed Oct. 20, 1954.

Exhibits Admitted in evidence: Plaintiff Nos. 1, 2, 4, 5 and 6.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 20th day of October, 1954.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14554. United States Court of Appeals for the Ninth Circuit. Aerial Lumber Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14554

AERIAL LUMBER COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

1. General Conditions (Exhibits 1 & 2) provide: "The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security." No evidence was presented by the Plaintiff as such a determination, either communicated to the Defendant or not, and Defendant contends that this was a necessary condition precedent to be proved by Plaintiff.

2. The General Conditions (Exhibits 1 & 2) provide: "The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale." Except for the costs of resale of $54.20 there was no other expense to the Government and by virtue of the provisions of the agreement between the parties, the Plaintiff

is not entitled to loss of profits for which the trial Court gave Plaintiff the Judgment in this case.

3. The trial Court erred in admitting Exhibit 5 generally into evidence over the objection of the Defendant, p. 33 of Transcript of Proceedings at Trial.

RAYMOND D. TORBENSON,
and
RICHARD M. THATCHER,

Attorneys for Aerial Lumber Company.

Receipt of copy acknowledged.

[Endorsed]: Filed January 11, 1955.